Supreme Court, U.S.
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No. /

05-628 NOV 14 2005

In The

Supreme Court of the United States

OFFICE OF THE CLERK

STATE OF NORTH DAKOTA, THROUGH THE NORTH DAKOTA DEPARTMENT OF HEALTH, AN AGENCY OF THE STATE OF NORTH DAKOTA; JOHN HOEVEN, GOVERNOR; WAYNE STENEHJEM, NORTH DAKOTA ATTORNEY GENERAL, EX REL. STATE OF NORTH DAKOTA; NORTH DAKOTA DEPARTMENT OF HEALTH,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, A FEDERAL AGENCY; GREGG F. MARTIN, DIVISION COMMANDER, NW DIVISION, PORTLAND, OREGON, UNITED STATES ARMY CORPS OF ENGINEERS; JEFFREY BEDEY, COLONEL, DISTRICT ENGINEER, OMAHA DISTRICT, STATE OF NEBRASKA, STATE OF MISSOURI, STATE OF SOUTH DAKOTA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Water Act (CWA) § 303(c), 33 U.S.C. § 1313(c) (Appendix 91-93), requires states to enact water quality standards for their navigable waters. North Dakota adopted standards for Lake Sakakawea, a reservoir on the Missouri River. The U.S. Army Corps of Engineers operates the reservoir. CWA § 313(a), 33 U.S.C. § 1323(a) (Appendix 101-102), requires all federal agencies and facilities to comply with state "water pollution" laws – which include their water quality standards promulgated under § 303 – and waives the government's sovereign immunity so that states can enforce their environmental regulations against all federal facilities. But the court below held that § 313's waiver of immunity does not extend to the Corps' authority over navigation because CWA § 511(a), 33 U.S.C. § 1371(a) (Appendix 105), exempts the Corps from § 313's immunity waiver whenever the Corps' authority over navigation "would be affected." (Appendix 5) This holding erred in two respects:

First, Congress amended § 313 in 1977 (Appendix 100-104 and 120-122) to make clear that it applied to the Corps of Engineers, and the amending waiver language Congress added to § 313(a) in 1977 was clear and unconditional: "This subsection shall apply notwithstanding *any* immunity of such agencies, officers, agents, or employees under *any law or rule of law*." The court below ignored that Congress added this unconditional waiver language to § 313 and the reason it was added: The holding of the Eighth Circuit in *Minnesota v. Hoffman*, 543 F.2d 1198 (8th Cir. 1976), *cert. denied*, *Minnesota v. Alexander*, 430 U.S. 977 (1977), that had held that § 511(a) exempted the

QUESTION PRESENTED – Continued

Corps from the pre-1977 version of § 313 (Appendix 100-101). Although the legislative history to the 1977 CWA amendments often does refer to the Corps' dredge-and-fill authority – because that is what the *Hoffman* case that prompted the amendment to § 313(a) was about – the amendatory language was not limited to the Corps' dredge-and-fill authority. Rather, the 1977 amendment to § 313 made clear that it was a waiver that applied "notwithstanding *any* immunity of such agencies . . . under *any law or rule of law*" – including, but not limited to, the Corps' dredge-and-fill activities under the CWA that had prompted the amendment.

Second, the Court implies that any application of North Dakota's water quality standards necessarily interfere with navigation. This is not true. The water quality standards for Lake Sakakawea can be enforced in most instances without adversely affecting navigation at all, and in nearly all instances in a way that affects navigation only minimally. The question presented is:

Whether the court below erred in holding as a matter of law that the Clean Water Act exempts the Corps of Engineers from complying with water quality standards North Dakota is required to enact under § 303(c) of the Act?

LIST OF PARTIES

The following are parties to the proceeding below:

United States Army Corps of Engineers (and their responsible officers as listed in the heading)
State of Missouri (intervenor on appeal)
State of Nebraska
State of North Dakota

The following entities were part of the multidistrict proceedings, but were not parties in this case:

United States Department of the Interior
United States Fish & Wildlife Service
American Rivers
Environmental Defense
National Wildlife Federation
Iowa Wildlife Federation
Kansas Wildlife Federation
Montana Wildlife Federation
Nebraska Wildlife Federation
North Dakota Wildlife Federation
South Dakota Wildlife Federation
Izaak Walton League of America, Inc.
MO-ARK Association, a Kansas non-profit
Ergon Asphalt & Emulsions, Inc.
Magnolia Marine Transport Co.
Blaske Marine, Inc.
Koch Materials Co.
Mid-West Terminal Warehouse Co., Inc.
Tosco, a subsidiary of Phillips 66 Co.
Jebro, Inc.
Memco Barge Line, Inc.
Coalition to Protect the Missouri River, a Missouri non-profit
ConocoPhillips Co.

LIST OF PARTIES – Continued

Midwest Area River Coalition 2000, a Missouri non-profit
Missouri River Keepers, an Iowa non-profit
Missouri River Energy Services, Inc.
Nebraska Public Power Dist.
State of South Dakota (as a party in the district court, as an amicus curiae on behalf of appellant on appeal)
Mandan, Hidatsa & Arikara Nation (as an amicus curiae in both the district court and on appeal on behalf of appellant)

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1.0 The decision of the Court below is of national significance for two reasons: First, it deprives states of authority to enforce their water quality standards under § 303(c) whenever, in the Corps' judgment, navigation may be impacted. Since the Corps has jurisdiction over all "navigable waters" under the CWA, this is an exception that swallows the whole. Second, it deprives states of their only tool for technology-forcing against the federal agency that has more impact on water quality than any other federal agency	16

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Summary of Engineering Data, Missouri River Main Stem Reservoirs ..... Pocket in Back Cover

Summary, Missouri River Environmental Impact Statement – Master Water Control Manual, Revised Draft (August 2001), entered as Exhibit 1 in the United States District Court, District of North Dakota ..... Bound Separately

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Gregg Easterbrook, *A Moment on Earth; The Coming Age of Environmental Optimism*, chapter 33 (Viking Penguin 1995) 17, 23

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Summary, Missouri River Environmental Impact Statement – Master Water Control Manual, Revised Draft (August 2001) 7, 14, 15

Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West*, 219-22 (Island Press 1992) 8

PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

CITATIONS TO OPINIONS BELOW

The citations for the reported and unreported opinions in this case, the courts that issued them, and the dates of the opinions, are:

- 418 F.3d 915, 8th Cir., Aug 16, 2005 (decision on appeal) (Appendix 1-9)
- 320 F.Supp.2d 873, D.Minn., Apr 12, 2004 (ruling on Corps' motion to dismiss) (Appendix 10-20)
- 277 F.Supp.2d 1378, Jud.Pan.Mult.Lit., Aug 12, 2003 (order consolidating cases – multi-lit case)
- 270 F.Supp.2d 1115, D.N.D., Jul 14, 2003 (ruling on North Dakota's preliminary injunction motion) (Appendix 21-54)
- (unreported) 2003 WL 21704402, D.N.D., Jul 14, 2003 (ruling on South Dakota's preliminary injunction motion)
- 264 F.Supp.2d 871, D.N.D., May 29, 2003 (order granting Corps' motion not to extend state district court's temporary restraining order to the preliminary injunction hearing) (Appendix 55-76)
- (unreported) 2003 WL 21196263, D.N.D., May 16, 2003 (order changing the average daily cubic feet per second (cfs) that may be released under the temporary restraining order to address a least tern nesting issue)

In addition, included in the Appendix is the following unreported state district court order in this case:

- Order issued by N.D. Dist. Ct., McLean County, Apr 29, 2003 (granting ex parte temporary restraining order and order to show cause against the Corps) (Appendix 77-88)

BASIS FOR JURISDICTION

The Eighth Circuit Court of Appeals issued its opinion in this case on August 16, 2005. No motion for rehearing or hearing en banc was made by any party. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT FEDERAL STATUTES AND CWA § 303(c) STATE WATER QUALITY STANDARD

Since they are lengthy, the relevant provisions – §§ 303, 313, 510 and 511 – to the Federal Water Pollution Control Act,[1] commonly referred to as the "Clean Water Act," are set forth in their entirety in the Appendix. (§ 303 – Appendix 89-100; § 313 – Appendix 101-104; pre-1977 version of § 313 – Appendix 100; 1977 CWA amendments to § 313(a) – Appendix 120-121; § 510 – Appendix 104; and § 511 – Appendix 105-107)

The relevant provisions from North Dakota's rules under § 303(c) are:

> Surface water classifications, mixing zones, and numeric standards.
>
> 1. Classifications. Procedures for the classifications of streams and lakes of the state shall follow this subsection. Classifications of streams

[1] 33 U.S.C. §§ 1251-1387